No. 10-1440

In the Supreme Court of the United States

HOUSE OF RAEFORD FARMS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly dismissed petitioner's interlocutory appeal where petitioner failed to demonstrate to the Fourth Circuit that it had colorable double-jeopardy arguments.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported. The opinion of the district court (Pet. App. 3a-28a) is not published in the Federal Supplement but is available at 2010 WL 2199675.

JURISDICTION

The judgment of the court of appeals was entered October 18, 2010. A petition for rehearing was denied on February 22, 2011 (Pet. App. 29a-30a). The petition for a writ of certiorari was filed on May 20, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury in the Middle District of North Carolina returned a superseding indictment charging petitioner with 14 counts of knowingly violating a require-

ment of an approved wastewater pretreatment program, in violation of 33 U.S.C. 1319(c)(2)(A). The district court denied petitioner's motion to dismiss the indictment on double-jeopardy grounds. The court of appeals dismissed petitioner's interlocutory appeal. Pet. App. 1a-2a.

1. The Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, prohibits the discharge of pollutants from any point source into waters of the United States without a permit issued under the National Pollutant Discharge Elimination System (NPDES). See 33 U.S.C. 1311(a). The CWA also regulates indirect discharges of pollutants into waters of the United States by regulating the discharge of pollutants into wastewater treatment plants operated by municipal governments, known as publicly-owned treatment works (POTWs). See 33 U.S.C. 1317(b). The CWA requires the Environmental Protection Agency (EPA) to promulgate federal standards for the pretreatment of wastewater discharged into a POTW and prohibits discharges that violate any such standard. 33 U.S.C. 1317(b)(3) and (d).

As relevant here, the EPA has implemented the CWA's pretreatment provisions by establishing the National Pretreatment Program as a component of the NPDES. See 40 C.F.R. Pt. 403. Because industrial pollutants compromise the water-treatment process, the EPA's pretreatment regulations specify that certain POTWs must establish pretreatment programs that impose requirements for industrial users that discharge pollutants into POTWs. See 33 U.S.C. 1342(b)(8); 40 C.F.R. 403.8(a); see also 40 C.F.R. 403.3(i) and (j). Those regulations also provide that industrial users generally may not bypass their own pretreatment facilities for wastewater that they ultimately discharge into a

POTW. 40 C.F.R. 403.17(a)(1) and (d). In light of the requirements imposed by the National Pretreatment Program, most sewage treatment plants in the United States are required by their NPDES permits to enact and enforce sewer ordinances and to issue permits that limit the amount of pollutants an industry is allowed to discharge into the POTW's sewer system.

The CWA authorizes the EPA to delegate to States the authority to issue and enforce NPDES permits, see 33 U.S.C. 1342(b), and makes it a federal crime knowingly to violate any requirement imposed by a State-approved permit or pretreatment program, 33 U.S.C. 1319(c)(2)(A). In 1975, the EPA delegated to North Carolina the authority to issue and enforce NPDES permits. Superseding Indictment 2 (Doc. 36).

2. The City of Raeford, North Carolina, operates a POTW under a NPDES permit issued by North Carolina, which authorizes the POTW to discharge its treated wastewater into a tributary of the Cape Fear River. Pet. App. 5a. The NPDES permit requires the City to require all industrial users discharging into its POTW to comply with the CWA, federal and state pretreatment regulations, and the City's approved Industrial Pretreatment Program. *Ibid*. The City's Industrial Pretreatment Program incorporates, among other things, the City's Sewer Use Ordinance and Industrial User Pretreatment permit program. *Ibid*. The City is authorized by its Sewer Use Ordinance to impose a "civil [monetary] penalty" for violations of its industrial-user permits. Pet. App. 21a; see Pet. Br. in Supp. of Mot. to Dismiss the Indictment, Exh. A, §§ 8.2-8.4, at 47-49 (Doc. 20, Exh. A) (Sewer Use Ordinance provisions authorizing civil fines and explaining that a state criminal

prosecution may be brought in addition to the City's imposition of civil fines).

Petitioner operates a large poultry-processing plant in the City of Raeford. Pet. App. 6a. Petitioner's plant generates on an average day approximately one million gallons of wastewater contaminated with, *inter alia*, blood, fats, and raw animal parts. *Ibid*. At all relevant times, petitioner possessed an Industrial User Permit issued by the City authorizing petitioner to discharge its pretreated wastewater into the City's sanitary sewer system, which leads to the City's POTW. *Ibid*.

Petitioner's permit required petitioner to process its wastewater with an on-site pretreatment system before discharging it into the sewer and ultimately the POTW, because of the contaminants in petitioner's untreated wastewater. Pet. App. 6a; see Gov't Br. in Opp. to Mot. to Dismiss the Superseding Indictment, Exh. 3, Pt. I, §§ C-D, at 4 (Doc. 50, Exh. 3) (IU Permit). The City's approved pretreatment program required that the City include in each permit a prohibition against unauthorized bypasses. Petitioner's industrial-user permit thus contained a provision expressly prohibiting petitioner from bypassing petitioner's pretreatment system and discharging untreated wastewater into the sewer and POTW without the City's prior approval. Pet. App. 6a; IU Permit Pt. II, § 7, at 9.

The Superseding Indictment alleges that, from February 2005 to August 2006, petitioner "bypass[ed]" its pretreatment system and discharged "untreated wastewater" directly into the sewer and POTW "on a routine and regular basis." Superseding Indictment 5-6. More specifically, it alleges that petitioner engaged in such conduct on at least 14 separate occasions. *Id*. at 6-13.

The City of Raeford assessed civil fines against petitioner for several instances in which petitioner engaged in "an unauthorized bypass of [its] pretreatment facilities" by allowing its untreated wastewater to "overflow[] by the bypass directly" into the sewer system. See, *e.g.*, Pet. Supp. Exhs. to Mot. to Dismiss Superseding Indictment (Pet. Supp. Exhs.), Exh. L at 2, 8, 11, 19, 25 (Doc. 55, Exh. L). The City determined that those discharges "negatively impact[ed] the City of Raeford's wastewater treatment facility" and/or the City's "ability to comply with NPDES permit limits." *Ibid.*[1] Although the City imposed civil fines for certain bypass violations, it has not assessed fines for several of the 14 separate unlawful bypass-discharges alleged in the superseding indictment. See Pet. App. 23a n.11.

3. On November 30, 2009, a federal grand jury indicted petitioner and its plant manager on 14 counts of violating the Clean Water Act. The superseding indictment alleges that, from January 2005 to August 2006, petitioner and its plant manager on 14 separate occasions knowingly discharged "untreated wastewater" directly into the sanitary sewer and the City of Raeford's POTW in order to keep its pretreatment system from overflowing contrary to a requirement of an

[1] Petitioner asserts (Pet. 3 n.1) that the City was able to treat effectively all the wastewater from petitioner's unauthorized bypass-discharges. Petitioner, however, "concede[s] * * * that environmental harm is not an element of the charged offenses." Pet. App. 20a. Moreover, the parties have yet to develop an evidentiary record that might fully address either the City's degree of success in treating petitioner's wastewater or the significant resources that the City expended in its attempt to remediate petitioner's unauthorized discharges of untreated wastewater.

approved pretreatment program, all "in violation of [33 U.S.C.] 1319(c)(2)(A)." Superseding Indictment 5-13.

Petitioner moved to dismiss the indictment, arguing that, as relevant here, the Double Jeopardy Clause barred the United States from prosecuting the conduct alleged in (many of) the counts of indictment because the City had previously imposed civil fines on petitioner for the same discharges. Petitioner admitted, however, that the City did not impose a fine for the September 28, 2005, discharge "alleged in Count Seven" of the indictment. Pet. Br. in Supp. of Mot. to Dismiss the Indictment 24 (Doc. 20).

The district court denied petitioner's motion. Pet. App. 3a-28a. The court, as relevant here, concluded that the United States as a "separate sovereign[] may prosecute the same conduct without violating the Double Jeopardy Clause." *Id.* at 24a; see *id.* at 23a-27a (double-jeopardy analysis).

In May 2010, petitioner noticed an interlocutory appeal from the district court's order "denying Defendant's Motion to Dismiss Counts 1-6 and 9-14" of the Superseding Indictment. Notice of Appeal (Doc. 67). Petitioner's jury trial was stayed pending appeal and has now been stayed pending resolution of this petition.

4. a. The court of appeals *sua sponte* ordered the parties to address the court's appellate jurisdiction. 10-4599 Docket entry No. 2 (4th Cir. June 3, 2010). The United States responded by filing a motion to dismiss (Pet. App. 31a-42a), arguing that appellate jurisdiction was wanting because petitioner did not present a "colorable" double-jeopardy claim that might justify an interlocutory appeal under 28 U.S.C. 1291 and the collateral-order doctrine. Pet. App. 36a-42a. The government provided two independent bases for that conclusion: First,

it argued that the United States and the State may both punish petitioner for the same conduct because the Double Jeopardy Clause does not prevent separate sovereigns from prosecuting the same conduct. *Id.* at 38a-40a. The government alternatively argued that, "[e]ven if the City's imposition of civil fines" might be imputed to the United States, the Double Jeopardy Clause does not prevent the imposition of both a civil sanction and a criminal punishment for the same conduct and, here, the City had merely assessed civil fines against petitioner in a proprietary, non-governmental capacity. *Id.* at 40a-41a.

In its opposition (Pet. App. 44a-55a), petitioner argued that the collateral-order doctrine applied, *id.* at 46a-52a, and that petitioner's double-jeopardy contentions were not frivolous because "the separate sovereigns doctrine" was inapplicable, *id.* at 52a-53a. Petitioner provided no response to the government's alternative contention that the civil fines do not preclude a subsequent criminal prosecution.

After the government argued in its reply that petitioner had failed to present a colorable argument for appeal because, *inter alia*, petitioner failed even to address the government's alternative basis for dismissal, petitioner submitted a sur-reply that for the first time purported to address that issue. The government then moved to strike the sur-reply because petitioner had failed to seek the court of appeals' leave to submit it.

b. The court of appeals granted the government's motions to strike petitioner's sur-reply and to dismiss the appeal in an unpublished, summary order. Pet. App. 1a-2a.

ARGUMENT

Petitioner contends (Pet. 7-12) that this Court has held that double-jeopardy claims may always be heard on interlocutory appeal under the collateral-order doctrine. Petitioner also contends (Pet. 5-7, 12-16) that the courts of appeals are divided about whether a "colorable" double-jeopardy claim is a "jurisdictional prerequisite" for interlocutory appeal and argues (Pet. 17-22) that it has presented "colorable" appellate arguments. Those contentions are without merit. The judgment of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. Contrary to petitioner's contention (Pet. 7-12), the court of appeals correctly dismissed petitioner's appeal. "The right of appeal * * * is purely a creature of statute." *Abney* v. *United States*, 431 U.S. 651, 656 (1977). "[I]n order to exercise that statutory right," a criminal defendant "must come within the terms of the applicable statute—in this case, 28 U.S.C. § 1291." *Ibid.* Section 1291 vests the courts of appeals with "jurisdiction of appeals from all final decisions of the district courts." 28 U.S.C. 1291. This Court has construed the term "final decisions" in Section 1291 to permit interlocutory appeals from certain collateral orders issued before final judgment. *Mohawk Indus., Inc.* v. *Carpenter*, 130 S. Ct. 599, 604-605 (2009). The Court, however, has repeatedly emphasized the "'modest scope'" of the collateral-order doctrine and demanded that "the class of collaterally appealable orders must remain 'narrow and selective in its membership.'" *Id.* at 605, 609 (quoting *Will* v. *Hallock*, 546 U.S. 345, 350 (2006)).

In *Abney*, this Court held that the denial of the defendant's pretrial motion to dismiss on double-jeopardy

grounds was immediately appealable as a collateral order under Section 1291. *Abney* observed that the Double Jeopardy Clause protects the right not to be "twice put to trial for the same offense," 431 U.S. at 657, 661, and that right "would be lost if the accused were forced to 'run the gaunlet' a second time before an appeal could be taken," *id.* at 662. But the Court also recognized that an unlimited right to pursue interlocutory appeals "may encourage some defendants to engage in dilatory appeals" and stated that that problem "can be obviated by * * * summary procedures and calendars to weed out frivolous claims of former jeopardy." *Id.* at 662 n.8. Shortly thereafter, in *United States* v. *MacDonald*, 435 U.S. 850 (1978), the Court observed that a double-jeopardy claim on interlocutory appeal "requires at least a colorable showing that the defendant once before has been in jeopardy of federal conviction on the same or a related offense." *Id.* at 862.

The Fourth Circuit applied those principles in *United States* v. *Head*, 697 F.2d 1200 (1982), cert. denied, 462 U.S. 1132 (1983), to conclude that a defendant's nominal double-jeopardy claims did not "entitle[] [the defendant] to interlocutory review under *Abney*," *id.* at 1206. See *id.* at 1204-1207. The court explained that a double-jeopardy claim that is "'frivolous[]' in the *Abney* sense" is "wholly lacking in merit" such that the "claim [nominally] advanced as one of 'double jeopardy' is," in fact, "manifestly *not* that in substantive content." *Id.* at 1204-1205 (emphasis added). In other words, *Head* concluded that an interlocutory appeal may be dismissed if "none of the claims [are] true double jeopardy claims." *Id.* at 1205.

This Court in *Richardson* v. *United States*, 468 U.S. 317 (1984), later elaborated on its observation in *Mac-*

Donald, explaining that "the *appealability* of a double jeopardy claim depends upon its being at least 'colorable.'" *Id.* at 322 (quoting *MacDonald*, 435 U.S. at 862) (emphasis added). *Richardson* concluded that "[a] colorable claim, of course, presupposes that there is some possible validity to a claim," adding that a nominal double-jeopardy claim will not be "colorable" one if "no set of facts will support the assertion of a claim of double jeopardy." *Id.* at 326 n.6. In such cases, *Richardson* concluded, "there is little need to interpose the delay of appellate review." *Ibid.* And in so ruling, *Richardson* specifically cited the Fourth Circuit's opinion in *Head* as a decision illustrating that frivolous double-jeopardy claims may be "weeded out by summary procedures." *Id.* at 322.

Read together, *Richardson* and *MacDonald* establish that whether a double-jeopardy claim is interlocutorily appealable turns on whether the claim is colorable. And a showing of former jeopardy is a necessary, but not sufficient, condition for a claim to be colorable. *MacDonald*, 435 U.S. at 862. More generally, the claim must have some "possible validity." *Richardson*, 468 U.S. at 326 n.6.

That application of the collateral-order doctrine's interpretation of Section 1291 is consistent with this Court's broader jurisprudence on non-colorable claims. The Court has long concluded that a dismissal may be warranted for want of Article III jurisdiction when a federal claim is "not colorable," *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 513 n.10 (2006), *i.e.*, when the "claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (quoting

Oneida Indian Nation v. *County of Oneida*, 414 U.S. 661, 666 (1974)); cf. *Camreta* v. *Greene*, 131 S. Ct. 2020, 2028-2029 (2011) (noting requirement of ongoing Article III controversy to warrant appellate review). A federal court of appeals might conclude that such a dismissal is warranted where, as here, the appellee argues that there is no colorable basis for interlocutory appeal, the appellant fails entirely to respond to an independent ground for that conclusion, and the court concludes the appellant's challenge in this respect is entirely devoid of merit. In such instances, the appellant can hardly complain after having failed to respond properly to its opponent's motion to dismiss arguing that the appellant has no colorable argument on appeal. Cf. *United States* v. *Nacchio*, 555 F.3d 1234, 1251 (10th Cir.) (en banc) ("In ordinary motion practice, a respondent must address any and all issues raised by a moving party's papers, or else face the very real possibility that it will be deemed to have abandoned its right to do so."), cert. denied, 130 S. Ct. 54 (2009).

In this case, the Fourth Circuit properly dismissed petitioner's non-colorable appeal. The government's motion to dismiss explained that petitioner needed to overcome two independent hurdles to secure a reversal—the separate-sovereigns doctrine and the civil nature of the City's fines—and it argued that petitioner could not mount a colorable challenge on either ground. See pp. 6-7, *supra*. Petitioner's failure to provide a response to the second, alternative ground for dismissal (see *ibid.*) itself reflects petitioner's inability to proffer a colorable double-jeopardy argument warranting interlocutory appeal. Indeed, although the court of appeals did not articulate its reasons dismissing petitioner's appeal, Pet. App. 1a-2a, its decision to strike petitioner's

sur-reply (*id.* at 2a) instead of granting the motion to dismiss and denying the government's motion to strike as moot is suggestive of its rationale. That disposition suggests that the court's dismissal order rests on petitioner's failure to present properly any argument in response to the government's contention that the civil nature of the City's fines independently showed that petitioner could not present a colorable double-jeopardy claim on appeal. Cf. p. 7, *supra* (noting that petitioner's sur-reply purported to address the civil-fine issue). That order is fully consistent with the court of appeals' earlier decision in *Head*, which this Court cited with approval in *Richardson*.[2]

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[2] Petitioner asserts (Pet. 17-20) that it presents a colorable double-jeopardy appeal because, in its view, it raises a "novel" issue of "[f]irst [i]mpression" concerning "the separate sovereigns doctrine." That is incorrect. Governments are separate sovereigns where, as here, they draw their authority to sanction the offender from separate sources of power. See *Heath* v. *Alabama*, 474 U.S. 82, 89 (1985). The City's fines here are authorized by local statute under state law, whereas this case was brought to prosecute violations of a federally approved pretreatment program under federal law, 33 U.S.C. 1319(c)(2)(A). Appellate courts that have considered double-jeopardy claims in analogous factual contexts have rejected them. See *United States* v. *Price*, 314 F.3d 417, 420-422 & n.1 (9th Cir. 2002) (finding defendant's same-sovereign argument colorable but "without merit"; declining to address whether county's civil fines were criminal in nature); *United States* v. *Louisville Edible Oil Prods., Inc.*, 926 F.2d 584, 585-588 (6th Cir. 1991) (affirming on the merits of separate-sovereign rationale with no indication that the court considered appellate jurisdiction).

More fundamentally, petitioner still fails to provide a reasoned argument that the City's *civil* fines trigger double-jeopardy protections. The City of Raeford's assessment of such fines under its Sewer Use Ordinance is a proprietary, rather than a governmental, municipal function under North Carolina law. See *Harrison* v. *City of Sanford*, 627 S.E.2d 672, 676 (N.C. Ct. App. 2006). The City therefore explained that if petitioner failed to pay the "civil [monetary] penalt[ies]" that the City

2. Petitioner argues (Pet. 5-7, 12-16) that the courts of appeals are divided over whether a "colorable" double-jeopardy claim is a "jurisdictional prerequisite" for interlocutory appeal. Petitioner is incorrect. It identifies no division of authority warranting this Court's review.

Several courts of appeals have concluded that a "colorable" double-jeopardy claim is a prerequisite to appellate jurisdiction under the collateral-order doctrine. See, *e.g.*, *United States* v. *Shelby*, 604 F.3d 881, 885 (5th Cir.), cert. denied, 131 S. Ct. 503 (2010); *United States* v. *Bhatia*, 545 F.3d 757, 759, 761 (9th Cir. 2008), cert. denied, 130 S. Ct. 127 (2009); *United States* v. *Bobo*, 419 F.3d 1264, 1267 (11th Cir. 2005); *United States* v. *Hickey*, 367 F.3d 888, 891 (9th Cir. 2004), cert. denied, 546 U.S. 872 (2005); *United States* v. *Abboud*, 273 F.3d 763, 769 (8th Cir. 2001); *United States* v. *Andrews*, 146 F.3d 933, 942 (D.C. Cir. 1998). It is not entirely clear whether the Fourth Circuit has adopted that view. Neither its unelaborated order in this case nor its decision in *Head* unambiguously expresses whether the Fourth Circuit considers the dismissal of such an appeal to reflect a lack of "jurisdiction." But even accepting petitioner's assumption that the court of appeals dis-

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assessed under the Sewer Use Ordinance, that failure would result in "escalated enforcement actions up to and including termination of sewer service." Pet. Supp. Exhs., Exh. L at 2. Moreover, the City emphasized that those civil remedies were distinct from and did "not in any way relieve or replace any other fines, penalties, or enforcement action." *Ibid.*; see pp. 3-4, *supra* (discussing civil fines under the City's Sewer Use Ordinance). It is well-settled that the Double Jeopardy Clause does not preclude a criminal prosecution which, like this case, follows the imposition of civil fines, even when the same sovereign that imposed the civil fines also brings the subsequent prosecution. *Hudson* v. *United States*, 522 U.S. 93, 98-100 (1997).

missed petitioner's appeal on "jurisdictional grounds" (Pet. 5), the court's decision would not conflict with that of any other court of appeals.[3]

Petitioner bases (Pet. 6, 13-14) its contrary contention exclusively on *United States* v. *Wood*, 950 F.2d 638 (10th Cir. 1991) (per curiam). The Tenth Circuit's per curiam decision in *Wood* distinguished between a court of appeals' "jurisdictional authority to hear an appeal" and its "supervisory power summarily to dismiss frivolous appeals," stating that "[t]he summary determination of whether a defendant has raised a colorable claim [was] not necessary to [its] jurisdiction." *Id.* at 642. That statement is difficult to square with this Court's conclusion in *Richardson* that "the appealability of a double jeopardy claim depends upon its being at least 'colorable.'" 468 U.S. at 322 (quoting *MacDonald*, 435 U.S. at 862). But the Tenth Circuit's foregoing statement in *Wood* was not necessary to its decision, because the court held that the "defendant's double jeopardy claims [we]re colorable" in any event. See *Wood*, 950 F.2d at 642. In a subsequent case, the Tenth Circuit has made clear that it considers colorability to be a "jurisdiction[al]" requirement, thus "dismiss[ing]" the portion of an interlocutory double-jeopardy appeal that it found not colorable. *United States* v. *McAleer*, 138

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[3] Not every "dismissal" of an appeal reflects a dismissal for want of appellate jurisdiction. For instance, a court of appeals has discretion to "dismiss [an] appeal" if the appellant fails to file an opening brief properly challenging the decision under review. Fed. R. App. P. 31(c). Such dismissals are not jurisdictional; they simply allow courts to terminate appeals without passing on their (unargued) merits. *Herrera-Castillo* v. *Holder*, 573 F.3d 1004, 1006 n.5 (10th Cir. 2009); *Rivas* v. *City of Passaic*, 365 F.3d 181, 190 (3d Cir. 2004); *Marcaida* v. *Rascoe*, 569 F.2d 828, 830 (5th Cir. 1978) (per curiam) (citing cases).

F.3d 852, 857 & nn.5-6 (discussing *Wood*), cert. denied, 525 U.S. 854 (1998).

3. Even if a division of authority might otherwise warrant this Court's review to resolve whether courts have appellate jurisdiction over non-colorable and interlocutory double-jeopardy claims, this case would not be an appropriate vehicle to resolve that question. Even assuming *arguendo* that petitioner's double-jeopardy contentions are correct, an interlocutory appeal would not prevent petitioner's trial in this case.

The indictment charges petitioner with 14 separate counts of knowingly violating a requirement of an approved wastewater pretreatment program by discharging untreated wastewater, in violation of 33 U.S.C. 1319(c)(2)(A). Petitioner did not appeal the district court's refusal to dismiss Counts 7 and 8, which, like the other counts, allege that petitioner "bypass[ed]" its pretreatment system, resulting in the knowing "discharge" of "untreated wastewater" (Superseding Indictment 5, 9). See p. 6, *supra* (discussing petitioner's notice of appeal). Moreover, petitioner presented no evidence that the City of Raeford fined petitioner for the bypass violations alleged in Counts 10, 11, 13, and 14. Pet. App. 23a n.11. Although the City fined petitioner for other violations that occurred on the same dates as the discharges of untreated wastewater alleged in those counts, the City's fines were for *distinct* violations, not for petitioner's unlawful bypassing of its pretreatment system. See Gov't Br. in Opp. to Mot. to Dismiss 27 (Doc. 50). Compare Superseding Indictment 10-12 (alleging discharges of untreated wastewater on February 9 and 22, March 28, and August 4, 2006), with Pet. Supp. Exhs., Exh. L at 35, 42, 44 (City fines for exceeding permit parameters for maximum concentrations of certain pollut-

ants in petitioner's wastewater on February 22, March 28, and August 4, 2006) and *id.* at 32 (City's fine for a different "bypass" violation on February 9, 2006). As a result, even under the legal theory advanced in the petition, petitioner must still be tried on six of the 14 counts alleged in the superseding indictment.

Evidence of the eight unlawful discharges that are the focus of petitioner's double-jeopardy contentions could independently be admissible at trial to establish, *e.g.*, petitioner's knowledge and absence of mistake or accident with respect to the other six bypass violations. See Fed. R. Evid. 404(b). And, as the Fourth Circuit's decision in *Head* makes clear, petitioner could appeal the counts of conviction that might result on double-jeopardy grounds after final judgment. See *Head*, 697 F.2d at 1207-1209 (resolving merits of double-jeopardy claims on post-conviction appeal); cf., *e.g.*, *Burks* v. *United States*, 437 U.S. 1 (1978) (reversing conviction on double-jeopardy grounds on appeal from final judgment). Petitioner thus presents no sound reason for this Court to grant interlocutory review and further delay petitioner's criminal trial in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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